

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CORY NAROG,

No. C 09-1696 MMC

Petitioner,

**ORDER DENYING PETITIONER'S  
MOTION FOR CERTIFICATE OF  
APPEALABILITY; DIRECTIONS TO  
CLERK**

v.

CALVIN REMMINGTON,

Respondent.

Before the Court is petitioner Cory Narog's "Motion for Certificate of Appealability," filed November 3, 2010. Having read and considered the motion, and having reviewed the Court's prior orders and the record of the state court proceedings, the Court, for the reasons set forth below, finds petitioner has failed to show he is entitled to issuance of a certificate of appealability.

First, petitioner has not shown he is entitled to a certificate of appealability with respect to the issue of whether Larche v. Simons, 53 F.3d 1068 (9th Cir. 1995) remains valid in light of O'Sullivan v. Boerckel, 526 U.S. 838 (1999). In particular, petitioner has not shown "reasonable jurists would find [this Court's] assessment," specifically, that nothing in O'Sullivan suggests Larche was incorrectly decided, to be "debatable or wrong." See Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) (internal quotation and citation omitted).

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1 Second, petitioner has not shown he is entitled to a certificate of appealability with  
2 respect to the issue of whether the Court erred in denying petitioner an evidentiary hearing,  
3 as well as an opportunity to conduct discovery to prepare for such a hearing, on the claims  
4 in the First Amended Petition. As noted in the Court's prior orders (see Order, filed June  
5 23, 2010, at 5:11 - 23, 7:4 - 12, 27 - 28; Order, filed October 4, 2010, at 2:7 - 3:1),  
6 petitioner's claims, as presented to the state court, were based on speculation, and, as a  
7 consequence, petitioner failed to develop the record with respect to said claims.<sup>1</sup> See Baja  
8 v. Bucharme, 187 F.3d 1075, 1079 (9th Cir. 1999) (holding federal habeas petitioner who  
9 "fail[s] to develop the factual basis of his claim in state court" is not entitled to evidentiary  
10 hearing in federal court). Petitioner has failed to show reasonable jurists would find the  
11 Court's finding to be debatable or wrong.

12 Accordingly, the motion is hereby DENIED.

13 Finally, the Court notes that although petitioner filed the instant motion within the  
14 time provided to file a notice of appeal, petitioner has not filed a separate notice of appeal.  
15 Because the United States Court of Appeals for the Ninth Circuit may construe the Motion  
16 for Certificate of Appealability as a notice of appeal, see Bell v. Mizell, 931 F.2d 444, 444-  
17 45 (7th Cir. 1991), the Clerk is hereby DIRECTED to docket the Motion for Certificate of  
18 Appealability as a notice of appeal and to forward said motion to the Ninth Circuit for its  
19 consideration, along with a copy of the instant order.

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22 <sup>1</sup>In particular, petitioner offered no evidence in state court to support his conclusory  
23 assertions that the videotape that is the subject of his claim under Brady v. Maryland, 373  
24 U.S. 83 (1963), was ever in the possession of the prosecution and/or that his trial counsel  
25 failed to request from the prosecution all videotapes in the prosecution's possession.  
26 Further, with respect to his claim that his trial counsel failed to present to the state trial  
27 court a Marsden motion petitioner allegedly prepared, see People v Marsden, 2 Cal. 3d 118  
28 (1970), petitioner failed to advise the state court of the contents of the motion or to  
otherwise advise the state court of the nature of any asserted conflict with his trial counsel;  
such a showing was required for there to exist any possibility of petitioner's establishing  
any asserted failure to present a Marsden motion constituted the type of deficient  
performance from which prejudice could be presumed. See Schell v. Witek, 218 F.3d  
1017, 1025-28 (9th Cir. 2000); see also id. at 1027 (noting "not every conflict or  
disagreement between the defendant and counsel implicates Sixth Amendment rights").

1       Petitioner is advised he may seek issuance of a certificate of appealability from the  
2 Ninth Circuit. See Fed. R. App. Proc. 22 (b)(1).

3       **IT IS SO ORDERED.**

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5 Dated: November 5, 2010

  
MAXINE M. CHESNEY  
United States District Judge